affiliation, and did not indicate what was in the package. (Rothhaupt at TR 117-118; R. 22 Jury Trial Transcript, pp. 15-16). Rather, when Mrs. Scott asked for more information about the caller and the package, the caller said only that it was from Colorado. (Rothhaupt at TR 117-118). Mrs. Scott, who was not expecting a delivery, told the caller to "hold on a minute" and turned to Mr. Scott to discuss the matter, but the caller abruptly hung up. (Rothhaupt at TR 117; R.22 Jury Trial Transcript, pp. 15-16).

A few minutes later, a man dressed in gray pants and a polo shirt parked his car on the street in front of the Scotts' house and approached the house carrying an unsealed box. (Rothhaupt at TR 120-122). The man told Mr. Scott, who was standing inside the house with the front screen door slightly ajar, that he had a delivery for 1712 Hilltop Drive. (Rothhaupt at TR 121). When Mr. Scott asked what the package was, the man replied that he was Petitioner with an eBay return, and asked for $100.00 as payment for a COD package. (Rothhaupt at TR 121-122). Mr. Scott declined the package, told Mrs. Scott to call the police, and obtained Petitioner's license plate number.

A dispatcher directed Deputy Dickow to respond to Mrs. Scott's call, telling him someone refused to leave the Scotts' property. (Ron Dickow at TR 8, 16). Dickow pursued Petitioner onto Interstate 71, and signaled him to pull over. (Rothhaupt at TR 136). Mr. Scott, who had been following Rothhaupt, pulled in behind Dickow's cruiser. (Rothhaupt at TR 136).

Dickow conferred with Mr. Scott, who said Petitioner had called the Scotts' home, would not identify himself, wanted to know whether anyone would be home, and hung up. (Ron Dickow at TR 17). Mr. Scott also told Dickow that Petitioner

showed up at the Scotts' house and refused to leave when Mr. Scott told him to do so. (Ron Dickow at TR 10-17).

Dickow approached Petitioner's vehicle and asked for Petitioner's license and registration. (Ron Dickow at TR 53) While he was speaking with Petitioner, he saw a rifle case in the back seat of the car. (Ron Dickow at TR 27-28). For his own protection, Dickow opened the car door and examined the rifle to ensure that it was not loaded. (Ron Dickow at TR 48). In so doing, he also saw military books and Department of Defense materials, which caused him alarm in light of the terrorist attacks that had occurred a week earlier. (Ron Dickow at TR 30). He conferred again with Mr. Scott, who repeated that Petitioner had refused to leave the Scotts' property when Mr. Scott told him to. (Ron Dickow at TR 53-54). Dickow then approached Petitioner and asked whether he had been at the Scotts' home. (Ron Dickow at TR 55). When Petitioner admitted he had, Dickow arrested Petitioner. (Ron Dickow at TR 55-56).

Dickow charged Petitioner with violations of KRS 508.150 (stalking in the second degree), KRS 525.080 (harassing communications), KRS 514.040 (theft by deception), and KRS 511.080 (criminal trespass in the third degree). (R. 20 Motion for Summary Judgment, Exh. 11).

Due to the suspicious nature of some of the items he had seen in plain view in Petitioner's vehicle, Dickow applied for and obtained a search warrant, and conducted a search of Petitioner's vehicle while Petitioner was in the Carroll County Detention Center. (R. 20 Motion for Summary Judgment, Exh. 12). Pursuant to the warrant, Dickow seized several military-related items, a pamphlet entitled "What to Do if Stopped by Police," and multiple identification cards. (R. 20 Motion for Summary Judgment, Exh. 13). In light of the

many alerts, warnings and communications the Carroll County Sheriff's Department had received in the aftermath of September 11, Dickow contacted the U.S. Department of Defense. (Ron Dickow at TR 73-74). An agent for the USDOD arrived and took possession of certain items. (Ron Dickow at TR 73-74). In searching the vehicle, Dickow also found several medications, including Ibuprofen 800, that he believed to be prescription medications and which were not in their original containers. (Ron Dickow at TR 44).

Petitioner posted bond and was released from the Detention Center the following day. (Rothhaupt at TR 174). In light of the medications he found during the search of Petitioner's vehicle, Dickow decided to charge Petitioner with a violation of KRS 218A.210, which requires certain prescription medications to be kept in their original containers. Dickow arrested Petitioner on that charge as he was leaving the Detention Center. (R. 20 Motion for Summary Judgment, Exh. 14). Petitioner was released shortly thereafter without posting further bond.

Ultimately, the prosecution dropped the charge lodged under KRS 218A.210. The remaining charges proceeded to trial. The Carroll District Court Judge dismissed the charges of stalking and theft by deception after the prosecution rested. The jury then acquitted Petitioner of the remaining charges, trespassing and harassing communications.

PROCEEDINGS BELOW

On September 20, 2002, Petitioner brought a 42 USC §1983 civil action against Carroll County, Sheriff Maiden, Deputy Dickow, and Mr. and Mrs. Scott, alleging violations of his rights under the Second, Fourth, Fifth and Fourteenth

Amendments. He also asserted numerous tort claims under state law.

Following a lengthy course of discovery, Defendants, Carroll County[1], Maiden, Dickow and Mr. Scott (collectively "Carroll County Defendants"), filed a Motion for Summary Judgment.[2] On June 21, 2004, the district court entered an Order granting summary judgment to Carroll County and Maiden, Dickow and Scott, in their official and individual capacities, on all of Petitioner's constitutional claims. Having disposed of all of Petitioner's federal claims, the district court declined to exercise jurisdiction over any of Petitioner's state law claims.

Petitioner appealed the district court's Order to the Sixth Circuit, arguing that summary judgment should not have been granted to any of the Defendants on his Fourth and Fourteenth Amendment claims. The Sixth Circuit upheld the district court's decision in its entirety, except that it reversed the district court's decision on Petitioner's unlawful arrest claim against Dickow individually. The Sixth Circuit remanded that claim for trial.

By way of this Petition for Writ of Certiorari, Petitioner asks this Court to review the Sixth Circuit's decision with respect to his "claims against Maiden, the Scotts, and Dickow, arising under federal constitutional law and state

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[1] Although Carroll County was not identified in the Complaint caption as a defendant, Carroll County was a defendant by virtue of the claims against Maiden, Dickow and Scott in their official capacities. Kentucky v. Graham, 473 U.S. 159 (1995).

[2] Mrs. Scott filed a similar motion separately and her motion was granted.

statute as a result of the search of Petitioner's car, as well as his deprivation of property and freedom" (Petition, p. 1). None of the arguments contained in the Petition, however, address Petitioner's claims against Carroll County, Maiden individually or Phyllis Scott.

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT IMPLICATE THE PATRIOT ACT AND IS MERELY AN ATTEMPT BY PETITIONER TO OBTAIN FURTHER REVIEW OF WHAT HE PERCEIVES TO BE THE MISAPPLICATION OF PROPERLY STATED RULES OF LAW.

There is no compelling reason to grant the Petition.

Petitioner characterizes the question presented by his Petition for Writ of Certiorari as one that implicates the USA PATRIOT Act, Pub. L. 107-56, Oct. 26, 2001, 115 Stat. 272.[3] In a similar vein, Petitioner contends that "this petition...should be granted because of the need to have this Court set parameters around permissible searches under the evolving case law of the Patriot Act." (Petition, p. 7) This case, however, has nothing at all to do with the USA PATRIOT Act and the assertion that it does is clearly erroneous. The USA PATRIOT Act was signed into law more than one month *after* Petitioner's arrest.[4] Therefore, the

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[3] The USA PATRIOT Act is the popular name for the Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act of 2001.

[4] Petitioner was detained and arrested on September 21, 2001. The Act was signed into law on October 26, 2001.

Act could have played no role whatsoever in Petitioner's detention and arrest or in the search of his vehicle. Since the arrest was not undertaken pursuant to any provision of the USA PATRIOT Act, this case is not part of "the evolving case law of the Patriot Act."

Further, Petitioner is not Muslim, Arab or otherwise a member of any group that has claimed it has been disproportionately impacted by the Act. Nor was Petitioner subject to any of the enhanced surveillance procedures, immigration provisions, strengthened criminal laws against terrorism or other law enforcement techniques that are granted in the Act. Thus, Petitioner's assertion that this Petition presents a question about the "well-intentioned extension of police authority under the Patriot Act" is disingenuous. Indeed, until the subject Petitioner was filed, Petitioner had never raised any issue remotely pertaining even remotely to the USA PATRIOT Act.

Absent any legitimate concern about the USA PATRIOT Act, there is simply no compelling reason to grant the Petition for Writ of Certiorari. The Petition does not claim that the Sixth Circuit relied on incorrect principles of law, but instead argues that the Sixth Circuit misapplied existing case law. As such, the Petition is a thinly disguised attempt to obtain an additional layer of appellate review. Under Supreme Court Rule 10, such attempts are disfavored: "A petition for writ of certiorari is rarely granted when the asserted error consists of...the misapplication of a properly stated rule of law."

Because there is no compelling reason to support the Petition, it must be denied.

II. REVIEW IS NOT WARRANTED BECAUSE THE SIXTH CIRCUIT PROPERLY APPLIED EXISTING LEGAL PRINCIPLES IN DETERMINING THAT RESPONDENTS WERE NOT LIABLE FOR THE ALLEGED VIOLATIONS OF PETITIONER'S CONSTITUTIONAL RIGHTS

Further, appellate review is not warranted because, notwithstanding Petitioner's arguments to the contrary, the Sixth Circuit properly applied existing legal principles to the undisputed facts of this case. In so doing, the Sixth Circuit correctly upheld the district court's decisions granting summary judgment to Maiden, Dickow and Seldon Scott in their individual capacities on his claims with respect to the legality of the initial detention, the seizure of Petitioner's rifle from Petitioner's vehicle during the investigatory stop, the seizure of other items from Petitioner's vehicle pursuant to a warrant and the retention of such items until the conclusion of his criminal trial.

A. THE SIXTH CIRCUIT CORRECTLY APPLIED EXISTING LEGAL PRINCIPLES TO THE ISSUE OF MAIDEN'S INDIVIDUAL LIABILITY

The district court properly granted summary judgment to Respondent Maiden in his individual capacity on Petitioner's §1983 claims, and the Sixth Circuit properly upheld the district court's decision. Maiden, who at the time of Petitioner's arrest, was the elected Sheriff of Carroll County, was not present during Petitioner's arrest, did not participate in the search of Petitioner's vehicle, did not initiate any investigation of Petitioner, and did not contact Petitioner's employer or any other entity about Petitioner. (Charlie Maiden at TR 9-10). In fact, Maiden did not even find out

that Petitioner had been arrested until after the fact. (Charlie Maiden at TR 10).

Liability of persons sued in their individual capacities under §1983 must be gauged in terms of their own actions. E.g., Leach v. Shelby Co. Sheriff, 6th Cir., 891 F.2d 1241 (1990). In particular, to be held liable under §1983 for conduct of their subordinates, supervisors must have been personally involved in that conduct. Jones v. City of Chicago, 7th Cir., 856 F.2d 985 (1988). In that regard, the law is well-settled that a supervisor is not liable under §1983 for the conduct of subordinates when there is no evidence that the supervisor engaged in, approved of, or knew of the complained-of conduct until after it occurred. Leach v. Shelby Co. Sheriff, 6th Cir., 891 F.2d 1241 (1990); Jones v. City of Chicago, 7th Cir., 856 F.2d 985 (1988). Thus, Maiden cannot be held liable individually under §1983 without evidence that he was personally involved in the complained-of conduct.

Acknowledging the lack of any evidence to suggest that Maiden had personally participated in any of the events that were the subject of Petitioner's Complaint, the district court appropriately granted summary judgment to Maiden in his individual capacity. (App. to Petition for Writ of Certiorari, p. 29-30) Consistent with the legal principles established in Leach, supra and Jones, supra, the Sixth Circuit appropriately upheld the district court's decision. (App. to Petition, p. 10-11).

The Petition does not suggest that the district court or Sixth Circuit applied incorrect legal principles to the issue of Maiden's individual liability. In fact, the Petition contains no explanation whatsoever as to why discretionary review should be granted on the issue of Maiden's individual liability. In

short, Petitioner simply has not shown the existence of a compelling reason to review the Sixth Circuit's decision with regard to Maiden's individual liability.

B. THE SIXTH CIRCUIT CORRECTLY APPLIED EXISTING LEGAL PRINCIPLES TO THE ISSUE OF SCOTT'S INDIVIDUAL LIABILITY

The district court properly granted summary judgment to Respondent Seldon Scott in his individual capacity on Petitioner's §1983 claims, and the Sixth Circuit properly upheld the district court's decision. At the time of Petitioner's arrest, Scott was appointed a special deputy pursuant to KRS 70.045 to assist in general law enforcement and the maintenance of public order. In that capacity, he was not generally expected to make arrests or otherwise perform the functions of a regular deputy sheriff. Rather, Sheriff Maiden called him on an as-needed basis to pick up witnesses and to perform other limited duties collateral to police investigations. The extent of Seldon Scott's involvement in Petitioner's arrest and the search of his vehicle is that Scott telephoned police to report Petitioner's unwanted presence on Scott's property, Scott was questioned as part of Dickow's investigation after Dickow was dispatched to respond to Scott's report, and Scott was present at the scene of Petitioner's arrest. Dickow, not Scott, made the decision to arrest Petitioner.

Since Scott did not arrest Petitioner, the district court appropriately granted summary judgment to Scott in his individual capacity. (App. to Petition, p. 29-30) Consistent with the legal principles established in Leach, supra and Jones, supra, the Sixth Circuit appropriately upheld the district court's decision. (App. to Petition, p. 10-11).

The Petition does not suggest that the district court or Sixth Circuit applied incorrect legal principles to the issue of Scott's individual liability. As with Sheriff Maiden, Petitioner simply has not shown the existence of a compelling reason to review the Sixth Circuit's decision with regard to Scott's individual liability.

C. THE SIXTH CIRCUIT CORRECTLY APPLIED APPROPRIATE LEGAL PRINCIPLES IN UPHOLDING THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT TO DICKOW IN HIS INDIVIDUAL CAPACITY ON THE BASIS THAT DICKOW DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS

Viewing the facts in the light most favorable to Petitioner, Dickow did not violate any of Petitioner's constitutional rights. As a result, the district court correctly granted summary judgment to Dickow and the Sixth Circuit properly upheld that decision.

1. The Sixth Circuit Correctly Applied Existing Legal Principles In Upholding The District Court's Decision Granting Summary Judgment To Dickow With Respect To The Initial Stop.

Under the Fourth Amendment, a police officer may stop a person if he can point to specific and articulable facts which give rise to a reasonable suspicion that the person is, has been, or plans to be involved in, criminal activity. Terry v. Ohio, 392 U.S. 1 (1968). In assessing the reasonableness of the stop, the facts are adjudged against an objective standard: Would the facts available to the officer at the moment of the

stop warrant a person of reasonable caution in the belief that the stop was justified? Id.

Citing these legal principles, the district court granted summary judgment to Dickow in his individual capacity, holding:

> Defendant Dickow had received a dispatch concerning the Scotts' complaint of someone trespassing on their property and reporting that [Petitioner] was the suspected trespasser. Under the totality of the circumstances, the Court finds that Dickow had reasonable suspicion supported by articulable facts of suspected criminal activity by [Petitioner] sufficient to justify a stop of [Petitioner's] car, and any claim premised on the stop shall be dismissed.

(App. to Petition, p. 34-35; Based on the same legal principles, the Sixth Circuit correctly upheld the district court's decision in that regard. (App. to Petition, p. 6-7)

Petitioner, of course, contends that Dickow exceeded the lawful parameters of a brief investigatory stop by handcuffing Petitioner and placing him in the back of a cruiser against his will. (Petition, p. 13) That contention is insufficient to demonstrate that the Sixth Circuit erred in ruling that the investigatory stop did not violate Petitioner's constitutional rights. The use of handcuffs and the placement of a suspect in a police cruiser during a Terry stop does not affect the legitimacy of the initial stop. Bennett v. City of Eastpointe, 410 F.3d 810 (6th Cir. 2005); U.S. v. Marxen, 410 F.3d 326 (6th Cir. 2005); Radvansky v. City of Olmstead Falls, 395 F.3d 291 (6th Cir. 2005). In any event, the real question Petitioner raises is whether the investigatory stop escalated into an arrest that required probable cause as a result of the

use of handcuffs and confinement of Petitioner in the cruiser. Houston v. Clark County Sheriff's Deputies, 174 F.3d 809 (6th Cir. 1999); Feathers v. Aey, 319 F.3d 843 (6th Cir. 2003). Of course, that is a non-issue with respect to this Petition, inasmuch as it is undisputed that Petitioner was arrested and the issue whether his arrest was supported by probable cause was remanded for trial by the Sixth Circuit to the district court.

Petitioner cites no legal precedent that would support an argument that the district court and the Sixth Circuit applied the wrong legal principles to the undisputed facts of this case. As such, Petitioner's only argument in support of further review is that the district court and the Sixth Circuit misapplied properly stated rules of law. Under Supreme Court Rule 10, such a reason for review is extremely disfavored.

2. The Sixth Circuit Correctly Applied Existing Case Law Pertaining To The Search Of Petitioner's Vehicle

a. The Sixth Circuit and the district court correctly applied existing legal principles in ruling that Dickow was entitled to summary judgment with respect to the removal of the rifle from Petitioner's vehicle.

During an investigative stop, a police officer may search a vehicle's passenger compartment "limited to those areas in which a weapon may be placed or hidden," so long as he reasonably believes "the suspect is dangerous and...may gain immediate control of a weapon." Michigan v. Long, 463 U.S. 1032 (1983). *See also* U.S. v. Bishop, 6th Cir., 338 F.3d 623 (2003); U.S. v. Hardnett, 6th Cir., 804 F.2d 353 (1986).

The Sixth Circuit applied these legal principles in deciding that Dickow could not be held liable for retrieving the rifle from Petitioner's vehicle, noting, on the basis of Michigan v. Long:

> Here, [Petitioner] admitted to having a rifle in his car's passenger compartment... [Dickow] could have searched the car for weapons as part of the Terry stop. [Petitioner] thus fails to allege a constitutional rights violation...

(App. to Petition, p. 10)

In fact, although Petitioner vigorously contested the legality of Dickow's actions in seizing the rifle[5] in the proceedings below, he does not seek review of that seizure through this Petition. In that regard, Petitioner concedes: "Petitioner does not object to the search of his vehicle for the weapon he identified as being in his car." (Petition p. 10)

b. The removal of military documents, Department of Defense materials, multiple drivers licenses and other paraphernalia from Petitioner's vehicle was done pursuant to a lawfully acquired warrant.

The focus of Petitioner's unreasonable search claim has now shifted to Dickow's search of Petitioner's vehicle for

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[5] In the proceedings below, the seizure of the rifle was not only the basis of a Fourth Amendment claim, but also a Second Amendment claim.

items other than the rifle.[6] In that regard, Petitioner contends that the search of Petitioner's vehicle at the scene of the investigatory stop extended beyond the seizure of the rifle. (Petition, p. 6, 10-11)

Petitioner misleads this Court in suggesting that Dickow searched for or seized anything other than the rifle from Petitioner's vehicle at the scene of the arrest. Dickow certainly *noticed* other items that made him suspicious when he entered Petitioner's vehicle to remove the rifle. However, he did not seize those items until after he had obtained a warrant. Having obtained a warrant – the legitimacy of which Petitioner has never challenged – Dickow searched the vehicle after it had been towed from the scene of the arrest and while Petitioner was in the Carroll County Detention Center.

There is no compelling reason to review this issue, particularly in light of the fact that the argument was never raised in the courts below.

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[6] In the proceedings below, Petitioner did not challenge the seizure of any item other than the rifle. While he asserted a Fourteenth Amendment claim based on what he alleged was the unlawful retention of those items after the criminal trial, he never asserted in any of his pleadings or Fourth Amendment arguments that those items should not have been seized in the first place. Thus, neither the Sixth Circuit nor the district court addressed the legality of the initial seizure of those items.

III. THE SIXTH CIRCUIT CORRECTLY APPLIED EXISTING LEGAL PRINCIPLES IN UPHOLDING THE DISTRICT COURT'S DECISION GRANTING SUMMARY JUDGMENT TO MAIDEN AND DICKOW ON PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS CLAIM BASED ON THE ALLEGEDLY UNLAWFUL RETENTION OF PROPERTY THAT WAS SEIZED PURSUANT TO WARRANT

Petitioner contends that Maiden and Dickow violated his Fourteenth Amendment right to due process of law by failing to return all of the property seized during the search of his car. The district court granted summary judgment on this allegation, and the Sixth Circuit upheld that decision, for two reasons. First, the evidence below demonstrated that Maiden and Dickow did not unlawfully retain any of Petitioner's property. Moreover, assuming *arguendo* Petitioner's property was unlawfully retained, Petitioner's constitutional claim is precluded by the existence of available state law remedies.

A. SINCE PETITIONER OFFERED NO PROOF THAT MAIDEN OR DICKOW FAILED TO RETURN HIS PROPERTY, THE SIXTH CIRCUIT APPROPRIATELY UPHELD THE DISTRICT COURT'S DECISION DISMISSING PETITIONER'S DUE PROCESS CLAIM

After arresting Petitioner, Dickow obtained a warrant that permitted him to search Petitioner's vehicle and to seize a number of specified items. (R. 20 Motion for Summary Judgment, Exh. 12) The evidence reflects that Dickow seized several items pursuant to that warrant: (1) A black computer bag. (2) A plastic, Iomega zip drive. (3) An Astec power

supply cord. (4) A Fujitsu laptop computer. (5) A Zip power supply. (6) A Logitech mouse. (7) An identification card issued by the U.S. Department of Defense, known as a DDFM2. (8) A Pennsylvania driver's license. (9) A black briefcase. (10) Eleven Motrin tablets. (11) Three Ibuprofen tablets. (12) Seven brown pills. (13) A black film canister. (14) A Remington rifle. (15) Ammunition for Remington rifle. (16) Additional ammunition for Remington rifle. (17) Four glass mugs. (18) One glass bowl. (19) Miscellaneous papers. (R. 20 Motion for Summary Judgment, Exh. 13). The evidence reflects that items (1) through (9) were taken by the U.S. D.O.D. to investigate potential terrorist activity.[7] (R. 20 Motion for Summary Judgment, Exh. 15).

At the conclusion of the criminal case against Petitioner, the Carroll County District Court ordered the Sheriff's Department to release all seized property to Petitioner, except for the "glass mugs" that were the subject of the disputed eBay transaction. (R. 20 Motion for Summary Judgment, Exh. 16)

Petitioner concedes that all objects taken by the USDOD, i.e. items (1) through (9), were returned to him directly by the USDOD. (Rothhaupt at TR 185-186) Items (10) through (16) and items (18) and (19) were returned to Petitioner on March 8, 2002. (R. 20 Motion for Summary Judgment, Exh. 17) Item (17), i.e. the "glass mugs", was not returned to

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[7] The USDOD was notified of Petitioner's arrest because items causing suspicion of terrorist activity were found in Petitioner's car, including a brochure entitled "What to do if stopped by law enforcement officials," multiple driver's licenses, a weapon and ammunition, and maps of U.S. Air Force bases.

Petitioner because it was specifically excluded from the order of the Carroll County District Court.

Thus, there is no evidence to support Petitioner's claim that Maiden or Dickow unlawfully retained any of the evidence seized from Petitioner's car pursuant to warrant.

Petitioner contended below that Dickow unlawfully retained "hundreds of documents, including 401k retirement account records and payment checks, as well as receipts and cancelled checks relating to his entire Pfaltzgraff collection" that had been seized during the search of Petitioner's vehicle. However, the proof below did not bear out Petitioner's assertions. In that regard, Dickow compiled a complete inventory of everything that he seized during the search of Petitioner's car, and all of the items were eventually returned to Petitioner. (R. 20 Motion for Summary Judgment, Exh. 13). None of the items that Petitioner alleged Dickow seized and retained are on that inventory. Petitioner has supplied no other proof that any of these items were ever taken by or otherwise in the possession of Dickow.

Rather, Petitioner's contentions are based on what he "remembers" being in his car when he left Colorado for Pennsylvania on September 14, 2001, versus what he could not find in his car when he returned to Colorado approximately ten days later. He asserts that all of the items that were missing when he returned to Colorado were seized by Dickow. Petitioner's assertion is based entirely on speculation and assumption. Since Petitioner did not perform an inventory of his car before he left Colorado, he could not possibly have identified "missing" items with any accuracy. Moreover, even if Petitioner's memory was accurate with respect to what was in his car before he left Colorado, it is pure speculation to assert that Dickow seized an item simply

because Petitioner could not find it when he returned to Colorado, given that the item could have been lost anywhere between Colorado and Pennsylvania during Petitioner's ten-day road trip.

On that point, Petitioner's deposition testimony underscores the unreliability of his assertions. Simply because Petitioner was unable to locate a jar of touch-up paint when he returned to Colorado, he included the jar on the list of items he assumed Dickow had seized. However, Petitioner eventually found the jar when he subsequently sold the car. (Jay Rothhaupt at TR 185) His assumption that Dickow seized the property and failed to return it was not only wrong, it was irresponsible.

As both the district court and the Sixth Circuit noted, Petitioner failed to produce any evidence that the items he now claims are missing were ever actually seized by Dickow. (App. to Petition, p. 12, 39-40) Absent any such proof, the dismissal of Petitioner's Fourteenth Amendment claim was required. Hall v. Tollett, 128 F.3d 418 (6th Cir. 1997).

B. ASSUMING *ARGUENDO* THAT MAIDEN OR DICKOW UNLAWFULLY RETAINED PETITIONER'S PROPERTY, THERE ARE ADEQUATE STATE LAW CLAIMS TO ADDRESS THE RETENTION

Moreover, assuming *arguendo* that Maiden or Dickow unlawfully retained his property, Petitioner's Fourteenth Amendment procedural due process claim is precluded by the existence of adequate state law remedies. Parratt v. Taylor, 451 U.S. 527 (1981) (overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986); Walters v. City of Norton, 6th Cir., 181 F.3d 106 (1999); Fox v. Van Oosterum, 6th Cir.,

176 F.3d 342 (1999). A state law action for conversion is, *as a matter of law*, adequate to redress claims similar to Petitioner's. Parratt v. Taylor, 451 U.S. 527 (1981); Walters v. City of Norton, 6th Cir., 181 F.3d 106 (1999); Fox v. Van Oosterum, 6th Cir., 176 F.3d 342 (1999).

Based on these established legal principles, the district court correctly granted summary judgment to Maiden and Dickow and the Sixth Circuit appropriately upheld that decision. (App. to Petition, p. 12, 40)

CONCLUSION

In light of the foregoing, there is no compelling reason to grant the Petition for Writ of Certiorari. This case does not involve the USA PATRIOT Act, as Petitioner has represented to this Court. Moreover, the Sixth Circuit's decision in this matter does not conflict with a decision of any other court on any important question of federal law. To the contrary, the Sixth Circuit relied on well-established principles of law and applied those principles to the undisputed facts of this case. Petitioner's only argument is that the Sixth Circuit misapplied those legal principles, resulting in an incorrect decision. Petitioner's assessment in this regard is wholly inaccurate. However, even if Petitioner's assessment were accurate, Supreme Court Rule 10 provides that the misapplication of established legal principles is not a compelling reason to grant a petition for writ of certiorari. Therefore, Respondents, Maiden, Dickow and Scott respectfully request that the Court deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

JEFFREY C. MANDO (#43548)
Counsel of Record
JENNIFER H. LANGEN (#87690)
ADAMS, STEPNER, WOLTERMANN
& DUSING, P.L.L.C.
40 West Pike Street
P.O. Box 361
Covington, KY 41012-0861
(859) 394-6200

Attorneys for Defendants, Charlie Maiden Jr., Carroll County Sheriff, in his individual and official capacities; Ron Wayne Dickow, Deputy Carroll County Sheriff, in his individual and official capacities; and, Seldon Scott, individually and in his official capacity as Special Deputy Director of Public Safety for Carroll County

No. 05-569

IN THE

Supreme Court of the United States

JAY ROTHHAUPT, PETITIONER

v.

CHARLIE MAIDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS' SELDON AND PHYLLIS SCOTT, INDIVIDUALLY IN OPPOSITION

Whitney Dunlap III
Counsel of Record
Burnam, Thompson, Simons,
Dunlap & Fore PSC
Box 726
Richmond, KY 40476
(859) 623-5205
(859) 623-7394 fax
Attorneys for Respondents Seldon and Phyllis Scott, Individually

GURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

INTRODUCTION

Respondents Seldon Scott and his wife, Phyllis Scott, in their individual capacities respond and seek denial of Jay Rothhaupt's Petition for Writ of Certiorari to this United States Supreme Court.

Petitioner here has filed his Petition for Writ of Certiorari seeking review of a summary judgment entered by the U.S. District Court for the Eastern District of Kentucky, and an order of the Sixth Circuit Court of Appeals partially affirming that judgment with respect to all claims against Seldon and Phyllis Scott, and against Sheriff Charlie Maiden. The Sixth Circuit remanded for trial the issue whether Petitioner's arrest was based upon probable cause, and thus the grant of qualified immunity given to the arresting officer, Deputy Ron Dickow.

Petitioner asserts as a reason this case should be reviewed by this court an allegation, first raised here, that this case somehow implicates the "evolving case law of the Patriot Act." In fact, these events took place on September 21, 2001, which precedes the USA Patriot Act, Public Law 107-56.

This case has been thoroughly reviewed by both a federal trial court, and a federal court of appeals, and petitioner's constitutional claims have all been thoroughly examined. In fact, were it not for this Petition for Writ of Certiorari, Petitioner would be headed for a jury trial on the heart and soul of his case, his claim that the arresting officer lacked probable cause to make the initial arrest. What remains behind as eliminated by the two lower courts are the collateral issues not germane to Petitioner's primary complaint, namely whether Phyllis and Seldon Scott, as individuals, violated Jay Rothhaupt's state and

constitutional rights when they reported his bizarre conduct to the police.

Petitioner presents no compelling reason why he should be given a third bite at the apple. He cannot explain why he should be allocated scarce resources for an issue that is not of national import, which does not reflect a conflict between the circuits, nor between this Supreme Court and the circuits. Petitioner cannot point to even a difference of opinion between the circuits that would be outcome determinative, let alone a square conflict.

This Petition should be denied. Petitioner does not dispute the propriety of the stop. (Petition, p. 7.) If that is so, he cannot dispute the entitlement of Phyllis and Seldon Scott to have set in motion the events that led to the stop. This is the extent of their individual liability here. The arrest was effected by the authorized officer, Deputy Dickow, and all criminal charges were preferred by the local prosecutor, the Carroll County Attorney, who is not a party. As against these respondents, the Petition should be denied.

STATEMENT

Petitioner's Statement of the Case is an inaccurate reflection of the facts before the U.S. District Court for the Eastern District of Kentucky, and the Sixth Circuit Court of Appeals. These Respondents adopt the factual Backgrounds as written by the U.S. District Court (App. 2-6), and by the Sixth Circuit Court of Appeals (App. 19-25).

This case is about a highly educated aerospace engineer who made it his mission to travel halfway across the United States to return four coffee mugs he bought in an online auction that he felt were non-conforming to their description. He intended to force a face-to-face encounter with the elderly couple who sold him the mugs after threatening them with fraud charges despite their offer to simply refund his money. He was arrested after provoking the encounter and frightening the elderly couple. He now believes that *his* civil rights were violated. Both the lower trial court and the court of appeals dismissed all claims against the Scotts, both as individuals and in Seldon Scott's official capacity as a special deputy.

Seldon and Phyllis Scott are a couple, near retirement age, who dabble on eBay selling collectibles. As the record reflects, this case began with Jay Rothhaupt, a Colorado Springs, Colorado aerospace engineer who worked on top-secret defense contracts involving Global Positioning Satellites used to aim warheads. In his spare time Rothhaupt unwound by buying Pfaltzgraf pottery on eBay. The Scotts had four coffee mugs they offered for sale by auction and Rothhaupt was the winner bidder at $59.00. Using the eBay financial system "PayPal" the Scotts

simultaneously mailed him the mugs as Rothhaupt electronically paid them the money.

Rothhaupt, the engineer, studied the mugs and decided that they had flaws more extensive than their descriptions. He complained and both sides exchanged emails. The Scotts offered a full refund to Rothhaupt in return for the mugs. Rothhaupt, suspecting he might be cheated twice, refused. The emails from Rothhaupt, which are part of the record, became increasingly shrill and heated, eventually threatening to file fraud charges with the U.S. Postal Service and with eBay. The Scotts felt afraid, threatened and harassed by the tone of these emails and offered for Rothhaupt to call them to resolve the problem, but Rothhaupt did not do so, instead sending more threatening emails.

In response to the harassment from this unknown eBay buyer, the Scotts solicited information about him from other "eBayers". The emails they received in reply to his inquiry are also part of the record before the Court. These emails alarmed the Scotts. One called Rothhaupt a "monster," and nearly all related similar scenarios involving small dollar auction sales that became so hotly disputed by Rothhaupt that the sellers surrendered both their product and their money. Whether these events were true or not, these events were actually told to the Scotts and it became part of the basis for their fear of Rothhaupt and their belief that he was terrorizing and harassing them.

Scott held a job at this time as the sole local civil defense officer, which made him a special deputy with the Carroll County, Kentucky Sheriff's Department. At work, he shared some of the details of Rothhaupt's alarming behavior with his co-workers, including Deputy Dickow and Deputy Medford.

For about a month after Rothhaupt's last email all remained quiet. Ten days after the events of September 11, 2001 was a Saturday. Rothhaupt claims that around this same time he had been invited to participate in an elk hunt and needed to zero in his rifle. To do so, he drove across the country to Gettysburg, Pennsylvania where his mother lived. Without communicating his intentions to the Scotts, he drove back to Colorado by heading south through Kentucky intending to hand-deliver the coffee mugs to the Scotts at their home in Carrollton, Kentucky. He exited the highway and was near their home before he first called them. Mrs. Scott answered the phone. Rothhaupt did not identify himself, only announcing that he had a delivery to make and asking whether the Scotts were home. Mrs. Scott asked where the package came from and the anonymous caller said, "Colorado". When Mrs. Scott covered the phone to ask her husband if he was expecting a package Rothhaupt abruptly hung up. He had the information he wanted—the Scotts were home. When the caller hung up, Mrs. Scott became scared and proceeded to lock all the windows and doors in the house. (App. 2-3, 15-17.)

A few minutes later Rothhaupt showed up at their door. Mr. Scott answered the door. He was dressed all in gray and was carrying an open box. The man said he had a delivery. He demanded $100.00 COD for the box. When Mr. Scott tried to learn who he was, Rothhaupt feigned confusion, and then asked, "Do you want to know who I am with?" After Scott said "yes", Rothhaupt declared, "I am Jay Rothhaupt." (App. 3.)

Scott then turned to his wife and told her to call the police. The parties dispute what happened next. Scott claims he immediately ordered Rothhaupt to leave his property, while Rothhaupt claims Scott told

him "I'm a law enforcement officer, stay there." This fact is immaterial, because Rothhaupt left the house still with the box of coffee mugs. As Rothhaupt drove away, Scott got into his car and followed him. (App. 3.)

Deputy Dickow enters the story here. He responded to the dispatcher's call after the dispatcher heard from Mrs. Scott. He stopped Rothhaupt just as Rothhaupt got back on the Interstate 71 heading home. Scott soon arrived as well, and pulled in behind Deputy Dickow's cruiser. (App. 3-4.)

Dickow went first to speak with Scott and then approached Rothhaupt's car. Dickow, who was already familiar with Rothhaupt's recent eBay activities, asked Scott what had just happened. Scott told Dickow that Rothhaupt called the house without identifying himself to find out if anyone was at home, came to the house uninvited, and refused to leave when ordered to do so. (App. 4.)

Dickow then approached Rothhaupt's car and asked Rothhaupt if he had just been to the Scott's home. Rothhaupt admitted he had, but claimed he had written permission to do so. Dickow asked to see the coffee mugs, but Rothhaupt refused. Dickow then ordered Rothhaupt to get out of the car and frisked him. Dickow asked Rothhaupt if he had any illegal drugs or firearms in the car. Rothhaupt denied having any drugs, but admitted he had a rifle hidden under a blanket in the backseat footwell of the car. (App. 4.)

Dickow next returned to Scott's car and questioned him again. Scott repeated that Rothhaupt had refused to leave their property when ordered to do so. Dickow then returned to Rothhaupt, placed him under arrest, handcuffed him, and put him in the back of the cruiser. Dickow then returned to the car, searched and found the rifle, a laptop computer,

military books and Department of Defense materials. (App. 24.) Soon another deputy arrived, Deputy Medford. Scott told Medford, according to Rothhaupt, "This is the guy I told you about at the station who's been doing this stuff to eBayer's and threatened me with fraud." Rothhaupt claims that at this point Medford and Scott joined in the search by removing the box with the coffee mugs from the car, and looking in Rothhaupt's personal papers. (App. 5, and 24.)

Dickow charged Rothhaupt with violations of Kentucky law, being second-degree stalking, harassing communications, theft by deception, and third-degree criminal trespass. After Rothhaupt was lodged in jail and his car impounded Dickow obtained a search warrant for the car based on the suspicious nature of some of the items he saw in plan view in Rothhaupt's vehicle. In that search he found a pamphlet entitled "What to Do If Stopped by Police," multiple identity cards, and prescription medicines in a black film container. (App. 5, 24.) Based on the recent national emergency, Dickow contacted the U.S. Department of Defense at Fort Knox Army Base. A special agent for the DOD arrived and took possession of certain items. (App. 24.)

Rothhaupt was eventually tried on the stalking, trespassing and harassing communications charges, but was found not guilty. (App. 5.) Subsequently, Rothhaupt brought civil rights claims under 42 USC § 1983, and other pendant state claims against the Carroll County Sheriff, Charlie Maiden, Deputy Sheriff Ron Dickow, and Seldon Scott in their official capacities, and against both of the Scotts individually. After a discovery period, the District Court granted summary judgment to all defendants on all claims. It found that the arrest was justified because Dickow had probable

cause to make the arrest based on the facts and circumstances within the arresting officer's knowledge which were sufficient to warrant a prudent man that the [arrestee] had committed or was committing an offense, citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964). The facts and circumstances reasonably relied upon by the officer were the dispatch regarding the Scotts' complaint of trespassing, Rothhaupt's admission he had been on their property, albeit allegedly with written permission, and Mr. Scott's assertions that Rothhaupt had refused to leave when ordered to do so. (App. 35) The trial Court might also have noted Dickow's prior familiarity with Rothhaupt's eBay activities vis the Scotts, the long distance he had traveled, and that he had shown up unannounced, and his demanding nearly twice the price of the coffee mugs as the cost of returning them "COD".

The Sixth Circuit Court of Appeals sustained the summary judgments as to all claims, except the initial arrest, ruling that Dickow lacked probable cause to make the arrest because Dickow impermissibly relied on Scott's description of events in disregard for the judicial admonition that "claims of an interested party in a contentious dispute...should be viewed in a skeptical light", citing *Radvansky v. City of Olmsted Falls*, 395 F.3rd 291, 302 (6th Cir. 2005). The Court of Appeals held that whether Dickow's body of information constituted probable cause was a jury question. (App7.) Next, the Sixth Circuit Court of Appeals ruled that because the right to be free from arrest without probable cause was an established constitutional right, Dickow's actions were not cloaked in qualified immunity.

REASONS FOR DENYING THE PETITION

I. NO CLAIMS ARE ACTUALLY ASSERTED AGAINST PHYLLIS SCOTT IN THE PETITION.

Except for being named as a party to the proceeding Petitioner makes no allegations against Phyllis Scott.

II. THE SIXTH CIRCUIT CORRECTLY HELD THAT SELDON SCOTT, BECAUSE HE DID NOT PARTICIPATE IN THE ARREST, COULDN'T BE HELD LIABLE FOR CONSTITIUTIONAL VIOLATIONS ARISING OUT OF THAT ARREST.[1]

Out of all the issues raised by Petitioner below, before the U.S. District Court and the Sixth Circuit Court of Appeal, Rothhaupt now raises only one allegation that Scott was acting under color of state law, which is that Scott became a state actor when he searched the box for the coffee mugs. Petitioner Rothhaupt concedes that Scott was not a state actor in the initial stop; that Scott was not a state actor in the arrest; and that Scott was not a state actor who used excessive force in effecting the arrest. Rothhaupt's sole claim against Scott, already decided twice below, is that

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[1] Seldon Scott is represented for all actions that arguably took place in his official capacity as special deputy of the Carroll County Sheriff's Department by the Hon. Jeffrey C. Mando, ADAMS, STEPNER, WOLTERMAN & DUSING, P.L.L.C., who is filing a separate Brief in Opposition on these questions.